IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3917 OF 1999

Pandurang Sakharam Mali, residing at R. No.93, 1st floor, Patel Building, Ganpat Kadam Marg, Worli, Mumbai – 400 018. ... Petitioner

Versus

1. State of Maharashtra through the Secretary, Animal Husbandry Dairy Development and Fisheries Department, Mantralaya, Mumbai - 400 032.
2. Commissioner Dairy Development, Maharashtra State Administrative Building, Abdul Gafoorkhan Marg, Worli Sea Face, Mumbai – 400 018.
3. General Manager, Greater Bombay Milk Scheme, Worli, Mumbai – 400 018. ... Respondents

Mr. N. Y. Gupte for the petitioner.

Mr. R.M. Patne, A.G.P. for the respondents.

CORAM : SMT. RANJANA DESAI & D.B. BHOSALE, JJ.

DATE ON WHICH THE JUDGMENT RESERVED : 3RD FEBRUARY, 2006.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 14TH FEBRUARY, 2006.

JUDGMENT:- [Per (Smt.) Ranjana Desai, J.]

1. In this petition filed under Article 226 of the Constitution of India, the petitioner has challenged judgment and order dated 12/2/1999 passed by the Maharashtra Administrative Tribunal, Bombay, (for short, “the Tribunal”) in Original Application No.510 of 1992.

2. The gist of the facts will have to be stated for better appreciation of the issues involved. The petitioner joined the Greater Bombay Government Milk Scheme as a driver in the year 1962. The Flying Squad of the Greater Bombay Government Milk Scheme had received oral as well as written complaints regarding the pilferage of milk. Therefore, on 23/2/1989, they decided to lay a trap. On that day, the petitioner was on duty on bit No.4. He was driving milk van No.M-123. Mr. S.S. Waghale, Security Officer and Mr. Ram Mayekar, Inspector visited the Worli Milk Centre early in the morning. They reached there before 3.00 a.m. At about 3.25 a.m., the petitioner came there in his van. He went to the adjoining building where he was residing. From there, he brought a can and he went at the back of the van. He broke open the seal of one of the cans and poured the milk from the said can into his can and poured water which he had brought from his house in his personal can into that can. Mr. Waghale and Mr. Mayekar asked the petitioner to stay his hands and not to make any movement. The petitioner then threw away the water which was in the empty can and when he was about to pour out the milk which he had collected in his personal can, he was caught by Mr. Waghale and Mr. Mayekar. They snatched the can from the

petitioner. A panchnama was drawn. The can on which the petitioner's name was engraved and which was in his possession was taken charge of. A detailed report of this incident was submitted to the superiors. Statement of the petitioner came to be recorded by Mr. Waghale as regards this incident. The petitioner requested Mr. Waghale and Mr. Mayekar to forgive him and give him one chance. He tried to explain away his conduct by saying that he had taken the milk only for the purpose of preparing tea. As regards this incident, the petitioner was served with the charge sheet on 5/5/1989.

3. On 9/12/1989, the petitioner was driving vehicle No.8. He had delivered the crates of milk at Centre No.80, Parle. When Mr. S.L. Prabhu, Assistant Milk Distribution Officer of Arey Colony reached there, he found that there were 18 bottles filled with milk in the cupboard of the Centre. Two empty bottles were also there. He found that those bottles were extra apart from the allotted bottles for distribution. When he questioned about the same, the persons who were present in the milk centre told him that the 20 extra bottles were delivered to them by the persons in vehicle No.8 and they were told to deliver them to a lady who delivers milk to people's houses and to take price of the milk from her when she comes back to take away the empty bottles. After receipt of this information, Mr. Prabhu followed vehicle No.8 and then he came along with the petitioner and the two persons in the said vehicle viz. Mr. Bacchav and Mr. Deo. He recorded their statements. The petitioner feigned ignorance about the 20 bottles. However, Mr. Bachhav and Mr. Deo stated in their statements that those 20 bottles were brought by the petitioner; that the

petitioner had taken the milk from the milk cans lying in the said milk van in those 18 bottles; then he had sealed those bottles by the seals which he had brought; he had directed that 20 empty bottles be collected from the lady and they had followed these instructions and handed over those 20 bottles to the said milk center as directed by the petitioner and instructed them to sell those 20 bottles to the lady who will come there to pay the price of 18 bottles of milk. As regards this incident, the second charge sheet was served on the petitioner on 13/2/1990.

4. The petitioner denied both the charges. A departmental enquiry was initiated against him. After completion of the departmental enquiry, the enquiry officer held that the petitioner was guilty of the misconduct alleged against him but taking into consideration his 26 years service, the enquiry officer recommended that the punishment of compulsory retirement be awarded to him.

5. The said report of the enquiry officer was accepted by the disciplinary authority. The disciplinary authority concurred with the enquiry officer. The disciplinary authority accepted the recommendation made by the enquiry officer and awarded the petitioner the punishment of compulsory retirement.

6. The petitioner preferred an appeal against the said decision to the Commissioner, Dairy Development. The said appeal came to be rejected on 30/6/1991. Thereafter, the petitioner filed Original Application No.510 of 1992

before the Tribunal. On 25/11/1997, the Tribunal quashed the order of compulsory retirement solely on the ground that the respondents had not furnished the petitioner copies of the enquiry reports dated 28/6/1990 and 28/9/1990 before the order of compulsory retirement was passed. It was held that the respondents had not followed the ratio laid-down by the Supreme Court in the case of ***Union of India v. Mohd. Ramzan Khan, AIR 1991 SC 471***. The respondents challenged the said judgment and order in Writ Petition No.501 of 1998. A Division Bench of this court, which heard the said petition referred to the judgment of the Supreme Court in ***Managing Director, ECIL, Hyderabad v. B. Karunakar, (1993) 4 SCC 727*** where the Supreme Court was, inter alia, considering what is the effect of non furnishing of the report on the order of punishment and what relief should be granted to the employee in such a case. The Supreme Court considered several judgments on the point including its judgment in ***Mohd. Ramzan Khan's case (supra)*** and observed as under :

> "(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other case it may have made no difference to the ultimate punishment awarded to him. Hence, to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical

> ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequences would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an unnatural expansion of natural justice "which in itself is antithetical to justice".:

7. The Division Bench quoted the above extract and observed in the light of the same that in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court or Tribunal and give the employee an opportunity to show how his or her case is prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. It was further observed that the Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished to the delinquent employee. After so observing the Division

Bench quashed the order of the Tribunal dated 25/11/1997. As the petitioner had already been reinstated, the Division Bench ordered that he shall continue in service. The Division Bench further ordered that as the petitioner has been furnished with a copy of the enquiry report, he cannot make a grievance that he has not been furnished the same. In the circumstances, the matter was remanded to the Tribunal and the Tribunal was directed to decide the same afresh in accordance with the law laid down in ***Managing Director, ECIL's case (supra),*** after giving sufficient opportunity to the petitioner to show cause as to how he was prejudiced by non-supply of the said enquiry reports. The order of compulsory retirement was stayed till the final decision of the Tribunal.

8. After remand, the Tribunal decided the original application afresh and by its judgment and order dated 10/2/1999 dismissed it. The Tribunal ordered that the petitioner, who was reinstated on account of the earlier decision of the Tribunal be removed in view of the fact that the order compulsorily retiring him had been upheld. This order is challenged in this petition.

9. It appears that after the Division Bench by its order dated 19/2/1998 remanded the matter, the petitioner filed an affidavit before the Tribunal to demonstrate as to how prejudice has been caused to him by reason of failure on the part of the respondents to supply him copies of the enquiry reports. In the said affidavit, the petitioner quoted extensively from the evidence recorded

by the enquiry officer and pointed out the alleged inconsistencies or contradictions in the evidence and stated that they were not noticed by the enquiry officer. He further stated in the affidavit that the findings of the enquiry officer are perverse; they are imaginary and have been returned without considering the material on record with a view to somehow finding the petitioner guilty. It was further stated that the evidence of the defence witnesses has gone unchallenged and if the petitioner had been supplied with the copies of the findings of the enquiry officer in advance then the drastic contradictions in the evidence of the departmental witnesses and perverse findings of the enquiry officer could have been pointed out by the petitioner to the disciplinary authority. It was further stated that the disciplinary authority has a right to differ from the findings of the enquiry officer and because the enquiry report was not supplied to the petitioner, the petitioner could not persuade the disciplinary authority to differ from the findings of the enquiry officer.

10. Mr. V.H. Raut, the Deputy Controller, N.T.S., filed a reply to the affidavit of the petitioner in which he refuted all the contentions of the petitioner. The petitioner filed a rejoinder again reiterating his stand. The Tribunal considered the affidavit of the petitioner. The Tribunal observed that the petitioner had participated in the departmental enquiry and he was given ample opportunity to defend himself. The petitioner had preferred an appeal against the order of the disciplinary authority and his appeal was dismissed. The Tribunal recorded a finding that in the affidavit in paragraph 2, the petitioner has raised

points by which he wants to show that prejudice was caused to him. The Tribunal further recorded that having gone through the points as well as the report of the enquiry officer, it is not possible to accept the submission that non supply of the report of the enquiry officer has caused any prejudice to him. The Tribunal further observed that it was not possible to hold that if the report was made available to the petitioner different consequences would have ensued. In view of this, after considering the evidence in its proper perspective, the Tribunal dismissed the original application and confirmed the order of compulsory retirement.

11. Mr. Gupte, the learned counsel for the petitioner contended that the enquiry report was furnished to the petitioner along with the punishment order. He submitted that the said report ought to have been furnished to the petitioner earlier so that the petitioner could have persuaded the disciplinary authority to absolve him of the charges because the enquiry report is perverse. Several contradictions and inconsistencies in the evidence have been ignored by the enquiry officer and this could have been pointed out by the petitioner to the disciplinary authority had the report been furnished to the petitioner well in advance. The learned counsel contended that, in fact, it was because the report was not furnished to the petitioner that this Court remanded the matter to the Tribunal and directed the Tribunal to consider the petitioner's case afresh in the light of the judgment of the Supreme Court in ***Managing Director, ECIL' scase (supra)***. He submitted that there is no indication in the impugned order that the Tribunal has, at all, considered the

petitioner's case in the light of the said judgment. The learned counsel contended that the enquiry officer was to merely conduct the enquiry. It was wrong on the part of the enquiry officer to recommend punishment of compulsory retirement as that was bound to influence the decision of the disciplinary authority on punishment. He, therefore, submitted that this court should set aside the impugned order and quash the order of compulsory retirement.

12. We have also heard Mr. Patne, the learned A.G.P. for the respondents, who has supported the Tribunal's order.

13. In ***Managing Director, ECIL' case (supra)***, one of the questions which the Supreme Court was considering was what is the effect of non-furnishing of the report of the enquiry officer on the order of punishment to be awarded to an employee. The Supreme Court observed that the reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. However, the

Supreme Court added a rider to this that whether, in fact, prejudice has been caused to the employee on account of denial of the report to him has to be considered in the facts and circumstances of each case. It was clarified that in all cases, where the enquiry officer's report is not furnished to the delinquent, the Courts and Tribunals should ensure that a copy of the report is furnished to the delinquent if it has not been furnished and then give an opportunity to him to show whether any prejudice has been caused to the delinquent. The Court or the Tribunal has to find out whether non supply of the report would have made no difference to the ultimate findings and the punishment given by the disciplinary authority. If the Court or the Tribunal comes to the conclusion that it would have made no difference to the ultimate findings and punishment, then no interference is necessary with the order of punishment. It is clear, therefore, that though a copy of the report is not supplied to the delinquent, it is open to the Court or Tribunal in a given case to order that it may be supplied to the delinquent and then hear the delinquent as to whether any prejudice has been caused to him. It is in the light of these observations of the Supreme Court that this court remanded the matter to the Tribunal. The Tribunal was, therefore, only required to examine whether any prejudice was caused to the petitioner.

14. In the affidavit, the petitioner set out the alleged contradictions and inconsistencies in the evidence and contended that if a copy of the report was supplied to him, he would have pointed out those inconsistencies and contradictions to the disciplinary authority and persuaded the disciplinary

authority not to award any punishment to him or atleast persuaded the disciplinary authority to award a lesser punishment. The Tribunal went through the affidavit and the counter affidavit and came to the conclusion that no prejudice was caused to the petitioner inasmuch as even after furnishing the report no different consequences would have followed.

15. We find no infirmity in this view of the Tribunal. In fact, we concur with it. We are of the opinion that the Tribunal has applied its judicial mind and confirmed the punishment. We have carefully perused the record. The allegations against the petitioner are serious. He was working as a driver in the Government Milk Scheme for Greater Bombay. The flying squad found that he broke open the seal of one of the milk cans; took the milk from the said can and put water therein. On the second occasion, it was found that he was tampering with the milk cans by pouring milk from them in milk bottles. He used to then seal those bottles and sell them. The first charge was established by the department in the departmental enquiry by leading the evidence of Mr. Waghale and Mr. Mayekar, who are eye witnesses. As regards the second incident, evidence of Mr. Prabha, Mr. Kulkarni and Mr. Sonawane is on record. The minor inconsistencies or contradictions in their evidence do not affect their credibility. The evidence of the petitioner does not inspire confidence. There is nothing on record to indicate that the departmental witnesses have any axe to grind against the petitioner. There is no reason to disbelieve them. In such a situation, in our opinion, the enquiry officer would not have returned any other finding but the one which he has

returned viz. that the charges against the petitioner have been proved. On the basis of enquiry report, the disciplinary authority could not have arrived at any other conclusion. Even the punishment of compulsory retirement is appropriate. Considering the serious nature of the allegations against the petitioner and the fact that he was found tampering with the essential commodity like milk, he could not have been given any lesser punishment. We do not think that if the enquiry report was supplied to the petitioner, it would have made any difference to the findings recorded or to the punishment awarded by the disciplinary authority.

16. We also do not find any substance in the submission of Mr. Gupte that the enquiry officer could not have recommended punishment. Mr. Gupte has drawn our attention to the observations of the Supreme Court in ***Managing Director, ECIL' s case (supra)*** where after quoting its judgment in ***A.D. D' iSva v. Union of India, AIR 1962 SC 1130***, the Supreme Court has held that the question of imposing punishment can only arise after inquiry is made and the report of the enquiry officer is received. It is for the punishing authority to propose the punishment and not for the enquiring authority to do so. The latter has, when so required, to appraise the evidence, to record its conclusion and if it thinks proper to suggest the appropriate punishment. It is pertinent to note that in ***A.D. D' iSva' s case (supra)*** the charge served upon the delinquent officer by the enquiry officer itself incorporated the proposed punishment. The above observation was made against the backdrop of these facts. But the

Supreme Court further clarified that neither the conclusion on the evidence nor the punishment which the enquiring authority may regard as appropriate is binding upon the punishing authority. Therefore, in our opinion, if the enquiring authority suggests punishment, that is not fatal. It is merely in the nature of recommendation which the disciplinary authority may accept or may not accept. We may also refer to the judgment of the Supreme Court in ***Union of India v. H.C. Goel, AIR 1964 SC 364***, to which reference is made by the Supreme Court in ***Managing Director, ECIL' scase (supra)***. The Supreme Court has observed in this case that if the enquiry officer makes any recommendation as regards proposed punishment, the said recommendation like his findings on the merits, are intended merely to supply appropriate material for the consideration of the disciplinary authority. Neither the findings nor the recommendations are binding on the disciplinary authority. These observations have been quoted by the Supreme Court in ***Managing Director, ECIL's case (supra)***. We are, therefore, of the opinion that the punishment suggested by the enquiry officer is merely recommendation made by the enquiry officer. It is not binding on the disciplinary authority. The order of the disciplinary authority cannot be set aside on the ground that the enquiry officer has recommended punishment and it was accepted by him. We do not find anything on record to come to a conclusion that the disciplinary authority was carried away by the recommendation made by the enquiry officer. The disciplinary authority has independently considered the case of the petitioner and awarded the punishment of compulsory retirement. In any case, in the

facts and circumstances of the case, we are of the confirmed opinion that the punishment of compulsory retirement is perfectly justified and the Tribunal has rightly dismissed the original application. We, therefore, find no merit in the petition. Petition is dismissed.

[SMT. RANJANA DESAI, J.]

[D.B. BHOSALE, J.]